UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFFREY S ALDAN,

Plaintiff,

v.

HOME DEPOT USA INC, d/b/a The Home Depot #4720, a foreign corporation,

Defendant.

CASE NO. 3:20-cv-05694-TL

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DAMAGES AND GRANTING PLAINTIFF'S MOTION FOR CONTINUANCE

This matter is before the Court on Defendant The Home Depot U.S.A., Inc.'s Motion for Partial Summary Judgment on Damages (Dkt. No. 24) and Plaintiff Jeffrey S. Aldan's Motion to Continue Trial and Amend the Case Schedule (Dkt. No. 54). Plaintiff filed this suit for personal injuries allegedly sustained when he was struck by a cart in the parking lot of a Home Depot store. Dkt. No. 1-1. Having considered the Parties' briefing, oral arguments, and the relevant record, the Court hereby GRANTS IN PART and DENIES IN PART Defendant's motion for summary judgment and GRANTS Plaintiff's request for continuance.

## I. RELEVANT BACKGROUND

This case arises from an incident that occurred in November 2017, when Plaintiff was struck by a cart while standing in the parking lot of a Home Depot store. Dkt. No. 1-1. Defendant claims that he sustained injures due to the negligence of Defendant's employees acting within the scope of their employment. *Id.* Plaintiff seeks damages, including "all special and economic damages suffered by the plaintiff." *Id.*

Trial in this case is currently set for February 6, 2023. Dkt. No. 23. The trial date previously has been continued four times with corresponding adjustments to the case schedule by stipulation of the parties. Dkt. Nos. 14, 16, 19, 23. Most recently, the Parties stipulated in December 2021 to continue the trial and extend relevant disclosure deadlines so Plaintiff could pursue additional medical treatment related to the injuries at issue in this case. *See* Dkt. No. 18. That additional treatment resulted in Plaintiff requiring a surgery (alleged to be related to the incident), which was scheduled for just prior to the extended expert disclosure deadline. *See* Dkt. No. 22 at 2. As such, the Parties again agreed to request an extension of discovery related deadlines to allow "experts on both sides [to] have the benefit of the additional treatment records from Plaintiff's surgery and post-op follow up." *Id.* The Court granted the parties' requested extension.[1] Dkt. No. 23. The extended discovery and disclosure deadlines have now passed. *See id.*

On August 25, after the extended expert disclosure deadlines, Defendant filed the instant motion for partial summary judgment to dismiss Plaintiff's claims for specific forms of damages,

[1] Although the Parties initially requested only an extension of pretrial deadlines without changing the previous trial date (*see* Dkt. No. 22-1), per the Court's Standing Order in All Civil Cases, the Court was unwilling to reduce the time between the dispositive motions deadline and trial as requested by the Parties. As such, and with approval of the Parties, the Court granted the stipulated motion and entered an amended schedule consistent with the Parties' request while resetting the trial date to comply with the Court's standing order. *Compare* Dkt. No. 22-1 *with* Dkt. No. 23.

including past medical costs, future medical treatment and costs, past wage loss, loss of future earning capacity, and other undisclosed economic damages. Dkt. No. 24 at 1-2. Plaintiff responded in opposition to the motion (Dkt. No. 26), and Defendant replied (Dkt. No. 28). The Court heard oral arguments from the Parties on the motion. Dkt. No. 51.

At the hearing on the motion, the Court directed Plaintiff to supplement the record with legal authority to support his position that producing medical bills coupled with disclosing the treating physician's intent to testify as to the reasonableness and necessity of the treatment is sufficient to allow the treating physician to further opine regarding the reasonableness of the charges for the services, without specifically disclosing the cost-related subject matter. The Court also indicated that it would consider continuing the trial one additional time upon an appropriate motion. The Court received Plaintiff's supplement (Dkt. No. 52), as well as a response from Defendant regarding the Plaintiff's supplemental authority *(*Dkt. No. 53). Plaintiff then filed an opposed motion to continue. *See* Dkt. Nos. 54-56. Being now fully appraised of the relevant facts, issues, and arguments, the Court rules as follows.

## II. LEGAL STANDARD

### A. Summary Judgment

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). At this stage, the Court does not make credibility determinations, nor does it weigh the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *accord Munden v. Stewart Title Guar. Co.*, 8 F.4th 1040, 1044 (9th Cir. 2021). The inquiry turns on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52. A genuine triable issue of material fact exists where "the evidence is such that a reasonable jury could return a verdict

for the nonmoving party." *Id.* at 248; *see also McSherry v. City of Long Beach*, 584 F.3d 1129, 1135 (9th Cir. 2009) (explaining that this is the inquiry at the summary judgment stage, "[s]tripped to its core"). To establish that a fact cannot be genuinely disputed, the movant can either cite the record or show "that the materials cited do not establish the ... presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

Once the movant has made such a showing, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (internal citation omitted); *see also Liberty Lobby*, 477 U.S. at 252 (specifying that the non-movant "must show more than the mere existence of a scintilla of evidence"); *accord In re Oracle Corp. Secs. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). The non-movant "bears the burden of production under [FRCP] 56 to 'designate specific facts showing that there is a genuine issue for trial.'" *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). Additionally, "all justifiable inferences" must be drawn in the non-movant's favor, *id.* at 255 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)). Thus, "where the facts specifically averred by [the non-moving] party contradict facts specifically averred by the movant, the [summary judgment] motion must be denied." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

**B. Continuance and Schedule Amendment**

Plaintiff's request to continue the trial and amend the case management schedule is governed by Federal Rule of Civil Procedure 16(b)(4), which requires a showing of good cause. Similarly, good cause is required to change pretrial disclosure deadlines. Fed. R. Civ. P. 26(a)(3)(b). The decision to modify a scheduling order is within the broad discretion of the district court. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir. 1992). The

Court "primarily considers the diligence of the party seeking the amendment" in applying the good cause standard. *Id.* at 609. If a party has acted diligently yet still cannot reasonably meet the scheduled deadlines, the Court may assert its discretion to modify its scheduling order. *Id.*

## III. DISCUSSION

### A. Motion for Summary Judgment

Defendant asks the Court to find that Plaintiff is unable to produce sufficient facts to support his claims for his medical damages, wage-based damages, and other undisclosed economic damages. Dkt. No. 24 at 2. For the most part, Defendant's arguments center on whether Plaintiff's expert witness disclosures and expert reports are sufficient to raise a genuine dispute of material fact as to Plaintiff's claims for these damages. *See* Dkt. No. 24 at 8-13.

#### 1. Medical Damages

Defendant challenges Plaintiff's claims for (1) past medical costs and (2) future medical treatment and costs. Dkt. No. 24 at 8-10.

##### a. *Past Medical Costs*

In Washington, "[a] plaintiff in a negligence case may recover only the reasonable value of medical services, not the total of all bills paid. . . . [and] only if supported by additional evidence that the treatment and the bills were both necessary and reasonable." *Patterson v. Horton*, 929 P.2d 1125, 1130 (Wash. Ct. App. 1997) (citing *Torgeson v. Hanford*, 139 P. 648, 649 (Wash. 1914)). Medical bills may be offered as proof of actual past medical expenses but are not sufficient on their own to establish the required elements of reasonableness and necessity. *Id.* Additional evidence regarding the reasonableness of medical costs "may come from any witness who evidences sufficient knowledge and experience respecting the type of service rendered and the reasonable value thereof." *Kennedy v. Monroe*, 547 P.2d 899, 906 (Wash. Ct. App. 1976).

Although Plaintiff has produced past medical bills, Defendant argues that Plaintiff cannot produce evidence speaking directly to the necessity and reasonableness of the cost of past treatment. Dkt. Nos. 24 at 8-9; 28 at 5-8. Defendant argues that any opinion testimony regarding past medical expenses offered by any of Plaintiff's disclosed expert witnesses must be excluded because Plaintiff's disclosures are insufficient as to this subject matter. *Id.* Specifically, Defendant argues that the disclosures of Plaintiff's treating physicians fail to include any cost-related subject matter and fail to summarize any cost-related facts or opinions they will offer. *Id.* Additionally, Defendant argues that the expert reports produced by Plaintiff's retained medical expert, Dr. Darby, do not include sufficient cost-related information to allow Dr. Darby to testify on that subject matter. *Id.*

(1) Expert Disclosures of Treating Physicians

Plaintiff points to his expert witness disclosures identifying all of Plaintiff's individual medical providers, which disclose the providers' intent to testify to the reasonableness and necessity of all medical treatment they provided Plaintiff related to his alleged personal injuries. Dkt. No. 26 at 6 (citing Dkt. Nos. 27-2, 27-3). Defendant argues that the disclosures indicate only that the treating physicians will opine as to the reasonableness and necessity of the *treatment* they provided and are otherwise silent as to the *cost* of said treatment. Dkt. No. 28 at 6. Plaintiff asserts that treating physicians are competent witnesses to provide testimony as to the reasonableness of costs for treatment provided. *Id.* at 2-3 (quoting *Kennedy*, 547 P.2d at 906 ("Proof of such special damages need not be unreasonably exacting and may come from any witness who evidences sufficient knowledge and experience respecting the type of service rendered and the reasonable value thereof.")). Plaintiff contends that his disclosures are therefore sufficient because treating physicians have traditionally been called to provide such cost-related testimony. *See* Dkt. No. 52 at 2.

The Court agrees that the providers likely meet the standard as potential expert witnesses regarding the cost of any treatment they provided. Unfortunately, Plaintiff fails to provide any authority for the proposition that he has met his disclosure obligations despite failing to disclose the treating physician's intent to provide cost-related opinion testimony.

Rule 26 is clear that expert witness disclosures must include "the subject matter on which the witness is expected to present evidence . . . and a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C). At oral argument, Plaintiff's counsel admitted that the treating physician disclosures were intentionally limited to treatment-related opinions to promote judicial efficiency at trial, although he now argues that he also assumed that the disclosures would be sufficient to allow cost-related testimony. Looking at what was actually included in Plaintiff's amended expert disclosures, Plaintiff expressly discloses his intent to have each of the listed treating physicians testify that Mr. Aldan's injuries and their respective treatments are related to the incident at issue in this case. *See* Dkt. No. 27-2 at ¶¶ 1-9. When the Court compares those disclosures to the summary provided in the same document regarding Dr. Darby's anticipated testimony, specifically that

> Dr. Darby is expected to provide opinion testimony regarding the nature and extent of plaintiff Jeffrey Aldan's injuries. *He will further testify as to the reasonableness and necessity of the medical expenses incurred by plaintiff Jeffrey Aldan for his injuries sustained as a consequence of the incident at issue.* Dr. Darby will testify regarding the reasonableness and necessity of future treatment for said injuries. . . .

(*id.* at ¶ 10) (emphasis added), the Court finds this disclosure consistent with counsel's admission that he made the strategic choice to have only Plaintiff's retained expert, Dr. Darby, testify as to the reasonableness and necessity of Plaintiff's medical expenses. The Court therefore rejects Plaintiff-counsel's post-hoc justification for failing to otherwise meet the disclosure requirements for the treating physicians to testify on the cost-related subject matter.

Consequently, the Court finds that Plaintiff failed to disclose the treating physicians' intent to testify as to the reasonableness or necessity of the expenses charged for their services pursuant to Rule 26(a)(2)(C).

(2) Dr. Darby's Expert Reports

Defendant also takes issue with Dr. Darby's ability to provide opinion testimony as to medical costs because he does not include any cost-based opinions in either of his disclosed expert reports. Dkt. Nos. 28 at 6; 27-3 at 8-34. Plaintiff's disclosure obligations for Dr. Darby, as a retained expert, include the production of "a written report—prepared and signed by the witness . . . . [that] must contain [in relevant part]: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; [and] (iii) any exhibits that will be used to summarize or support them . . . ." Fed. R. Civ. P. 26(a)(2)(b). Plaintiff also has a duty to supplement the report to correct any deficiency by no later than "the time the party's pretrial disclosures under Rule 26(a)(3) are due." *Id.* at 26(e)(2). At oral argument, Plaintiff's counsel acknowledged that Dr. Darby did not include any discussion of medical costs in either of his expert reports. Instead, Plaintiff provided a supplemental declaration from Dr. Darby—as an exhibit in support of his opposition to summary judgment—in which Dr. Darby provides the cost-related information missing from his previous reports. Dkt. No. 27-4. Plaintiff further notes that, despite the deficient expert reports, he disclosed Dr. Darby's intent to testify as to the reasonableness and necessity of medical expenses as early as December 2021. Dkt. No. 26 at 5 (citing Dkt. No. 27-2). Defendant asks the Court to strike Dr. Darby's declaration as an impermissible untimely supplement of Plaintiff's required disclosures. Dkt. No. 28 at 3-5.

The Court finds that Plaintiff's counsel clearly failed to properly disclose Dr. Darby's cost-related opinions. Thus, Plaintiff has failed to meet his expert witness disclosure obligations

for any expert witness to testify as to the reasonableness and necessity of Mr. Aldan's past medical costs. *See* Fed. R. Civ. P. 26(a)(2)(B),(C).

The question the Court must now answer is what is the appropriate sanction, if any, for Plaintiff's deficient disclosures.

(3) Sanction for Deficient Disclosures

"If a party fails to provide information . . . required by Rule 26(a) or (e), the party is not allowed to use that information . . . unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). At oral argument, Defendant asserted that exclusion is an automatic sanction, and the Court is precluded from applying either the substantial justification or harmless error exception because Plaintiff did not expressly request any exception or identify a potential lesser sanction in his opposition briefing. Defendant's position misstates the Court's discretion in assessing potential Rule 37(c) sanctions. "The automatic nature of the rule's application does not mean that a district court must exclude evidence . . . . Rather, the rule is automatic in the sense that a district court *may* properly impose an exclusion sanction where a noncompliant party has failed to show that the discovery violation was either substantially justified or harmless." *Merchant v. Corizon Health, Inc.*, 993 F.3d 733, 740 (9th Cir. 2021) (emphasis original). Generally, the Court has wide latitude in determining an appropriate sanction under Rule 37(c)(1), even if the sanctioned party fails to request a specific lesser sanction. *See id.* (discussing the scope of a district court's discretion to automatically apply the exclusion sanction when the party being sanctioned fails to argue harmless error or request a lesser sanction).

Here, the Court recognizes that it *could* automatically exclude all cost-related testimony from the disclosed expert witnesses because Plaintiff failed to expressly argue the harmlessness exception or request a lesser sanction in opposition to the motion for summary judgment. On the other hand, the Court notes that Plaintiff nonetheless evinced sufficient factual details to flag the

issue for the Court. Thus, the Court was able to raise the issue at oral argument and hear the Parties' respective positions.

As for the disclosed treating physicians, the Court finds that Plaintiff's failure to include cost-related subject matter in his disclosures cannot be saved by the substantial justification or harmless error exceptions. Plaintiff's counsel admitted that the subject matter was intentionally excluded from the disclosures for efficiency reasons. Discovery proceeded accordingly. Thus, the Court cannot now accept counsel's post-hoc justifications or find that it would be harmless to allow the treating physicians to testify on this subject matter. The Court therefore ORDERS that the disclosed treating physicians are excluded from providing cost-related testimony per Rule 37(c)(1).

The circumstances regarding Dr. Darby's cost-related testimony are different. There is no question that Defendant was aware of Plaintiff's intent to provide cost-related testimony through Dr. Darby in advance of receiving his deficient supplemental report in July 2022. *See* Dkt. No. 27-2 at 5. Defendant also had prior notice of all the expenses that Plaintiff might claim. *See* Dkt. No. 27-1; *see also* Dkt. No. 28 at 7 (acknowledging in reply that Plaintiff has produced medical bills in discovery). Defendant argues that it had no duty to review prior disclosures and instead relied on Dr. Darby's written reports in preparing its deposition strategy. When asked at the hearing about being allowed to re-depose Dr. Darby, Defendant argued that any expansion of the discovery period to correct Plaintiff's disclosure error would necessitate further delay in resolving the case, and Defendant would incur additional expenses in preparing to rebut and defend against the expanded testimony. Defendant therefore argues that it would be unfairly prejudiced by any sanction short of exclusion. The Court finds that any such prejudice is easily ameliorated.

The Court acknowledges that this case has been pending for more than two years, but all previous delays and continuances were mutually agreed upon by both Parties, and it is unclear how any further delay now prejudices Defendant more than Plaintiff.[2] Additionally, at oral argument, Plaintiff's counsel conceded that the Court could potentially shift to Plaintiff the costs Defendant may incur due to his disclosure error as an alternate to the harsh penalty of exclusion of such vital testimony. The Court is further guided by the principal that actions should be decided on the merits where possible, and the public interests of justice and the search for truth outweigh deciding such issues on technicalities. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988) (citing *Foman v. Davis*, 371 U.S. 178 (1962); *see also In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d 1217, 1248 (9th Cir. 2006) ("Fundamentally, the []plaintiffs' delay in providing information they had already given did not cause prejudice sufficient to warrant dismissal (as opposed to a different kind of sanction), especially in view of the public policy favoring resolution on the merits.").

Given the facts in this case, the Court excuses the untimely supplementation of Dr. Darby's expert reports as harmless and DENIES Defendant's motion to strike Dr. Darby's supplemental declaration (Dkt. No. 27-4). The Court shall extend the discovery period for the following limited purposes: (1) allowing Defendant additional time to depose Dr. Darby regarding his newly disclosed cost-related testimony, at Plaintiff's expense; (2) allowing Defendant to submit an expert rebuttal report if they wish, and (3) allowing Plaintiff an opportunity to depose the rebuttal expert. The Court will entertain a motion for costs by

[2] The Court also considers the unique circumstances of this case necessitating deferral of ruling on certain issues in this motion per Rule 56(d) (*see infra* §§ III.A.2.b, B) as further reducing the magnitude of any prejudice to Defendant of allowing a limited expansion of the discovery period.

Defendant upon its submission of an accounting of the logistical expenses for re-deposing Dr. Darby.

Consequently, the Court finds that Plaintiff has presented sufficient evidence to survive summary judgment as to past medical costs. Defendant's motion as to these damages is DENIED with leave to re-file, but only with regard to any arguments that may arise due to the additional discovery of Dr. Darby and if appropriate.

b. ***Future Medical Treatment and Costs***

To sustain a claim for future medical damages, Plaintiff bears the burden of showing that any future medical treatment "is reasonably certain to be necessarily incurred" and "will be necessitated by the injury suffered." *Leak v. U.S. Rubber Co.*, 511 P.2d 88, 92 (Wash. Ct. App. 1973). Defendant challenges Plaintiff's intention of seeking damages for future treatment recommended by Dr. Darby, his retained medical expert in occupational medicine. Dkt. No. 26 at 7. Specifically, Dr. Darby recommended the following treatment beyond what Plaintiff had received by July 2022 when Dr. Darby prepared his supplemental report: (1) annual evaluation by an orthopedic surgeon, (2) post-surgical physical and pool therapy, (3) ongoing mental health support indefinitely. Dkt. No. 27-3 at 22. Defendant argues that Dr. Darby's expert report and deposition testimony is not specific enough to "provide a reasonable basis for estimating" how much damages to award. Dkt. No. 28 at 6. This argument puts the cart before the horse.

To survive summary judgment as to a claim for future medical damages, Plaintiff need only raise a genuine dispute of fact as to whether future treatment "is reasonably certain to be necessarily incurred" and "will be necessitated by the injury suffered." *Leak*, 511 P.2d at 92. Dr. Darby's reports and testimony provide sufficient "facts showing that there is a genuine issue for trial" as to whether Plaintiff may pursue damages for future treatment. *Ricci*, 557 U.S. 586 (internal quotation and citation omitted).

Plaintiff need not rely on Dr. Darby's testimony to establish the amount of future damages that should be awarded. Unlike past medical costs, expert testimony is not required to allow a jury to determine the amount of future damages to award once the necessity of future treatment is established. *See Bitzan v. Parisi*, 558 P.2d 775, 778-79 (Wash. 1977) (en banc) (concluding in a personal injury suit that "a future damage instruction can be given even though there is no medical testimony"); *Erdman v. Lower Yakima Valley, Washington Lodge No. 2112 of B.P.O.E.*, 704 P.2d 150, 157 (Wash. Ct. App. 1985) ("Once liability for damages is established, a more liberal rule is applied when allowing assessment of the damage amount."). Here, Plaintiff notes that he has presented evidence of medical bills for past similar treatments that can be used to show the likely expenses that will be incurred for any future treatments. Dkt. No. 26 at 7. "[M]edical records and bills [are] admissible . . . without a showing of reasonableness and necessity[] to prove costs of future treatment." *Patterson*, 929 P.2d at 1131 (citing *Erdman*, 704 P.2d at 157).

The Court therefore finds that Plaintiff has presented sufficient evidence to survive summary judgment as to future medical treatment and costs. Defendant's motion as to these damages is DENIED.[3]

2. **Wage-Based Damages**

Defendant challenges Plaintiff's claims for (1) past wage loss and (2) loss of future earning capacity. Dkt. No. 26 at 11-13.

[3] Defendant takes issue with the lack of specificity regarding the potential future damages being sought. The Court addresses Plaintiff's evidentiary issues regarding his treatment status in conjunction with his motion to continue below in Section III.B.

a. ***Past Wage Loss***

Defendant argues that Plaintiff failed to "disclose an expert competent to testify" as to his lost wages. Dkt. No. 24 at 11. Plaintiff notes that his only claim for past wage loss relates to his April 2022 hip surgery and subsequent recovery. Dkt. No. 26 at 8. Plaintiff clarifies that he does not intend to pursue past wage damages for any other period, but because Plaintiff has not yet been cleared to return to work post-surgery, the full extent of his potential surgery-related wage claim in not yet known. *Id.* Defendant concedes that Plaintiff has provided wage related evidence (such as paystubs and tax returns). Dkt. No. 28 at 8. This evidence appears to show Plaintiff's regular income during the months leading up to his surgery. *See* Dkt. 27-9.

The fact that Plaintiff ended up having surgery in April could not be a surprise to Defendant, as the Parties, as early as December 2021, mutually agreed to continue the previously scheduled trial and related dates in part because "Plaintiff continues to receive care and treatment for his incident-related injuries and [was] scheduled to be evaluated in January 2022 by an orthopedic surgeon." Dkt. No. 18 at 2. The Parties again agreed to extend case deadlines "so experts on both sides will have the benefit of the additional treatment records from Plaintiff's surgery and post-op follow up." Dkt. No. 22 at 2.

Defendant appears to argue that Plaintiff must produce an expert who can competently testify as to the calculation of wages lost in relation to the surgery but does not provide any authority to support this proposition. Plaintiff argues that his orthopedic surgeon, Dr. King, is sufficiently competent to testify as to the reasonableness and necessity of the surgery and the post-surgery recovery period, as well as the post-surgical conditions that have kept Plaintiff from being able to return to work until medically released. Dkt. No. 26 at 8-9. Plaintiff argues that once the total amount of time off work due to the surgery is known, the related loss calculation

would be a simple calculation based on the paystub evidence. *Id.* at 9. The Court fails to see why an expert would be needed for such a calculation.

Consequently, the Court finds that Plaintiff has produced sufficient facts to allow his claim for surgery related wage loss damages to proceed and DENIES Defendant's request for summary judgment on this issue.

b. ***Loss of Future Earning Capacity***

Defendant argues that Plaintiff has presented no evidence to support a potential claim for future wage loss or loss of future earning capacity. Dkt. No. 24 at 12-13. Defendant points to the fact that Plaintiff continued to work full-time after being injured, at least until his surgery in April 2022, to argue that Plaintiff will be unable to establish lost capacity. *Id.* Plaintiff responds that he had to have surgery and has not yet been medically cleared to return to work. Dkt. No. 26 at 9. In his post-surgery report, Dr. Darby opines that Plaintiff "has a permanent partial impairment of the left lower extremity," and estimates him to be 20% impaired. Dkt. No. 27-6 at 5. Dr. Darby also recommends a "functional capacities evaluation" to determine if he can continue in his current occupation. *Id.* Plaintiff asserts that such an evaluation would be premature before Plaintiff is medically cleared to resume working. Dkt. No. 26. at 9.

Defendant argues there is insufficient evidence from which a trier-of-fact can determine the extent of Plaintiff's future work capacity. "Proof of [disability and lost earnings] as late as at time of trial even though subjective in character [may] warrant an instruction on future damages." *Bitzan*, 558 P.2d at 778. Thus, the lack of specificity as to what future damages may be recovered does not necessarily prohibit a future-damages claim as a matter of law at this stage. Additionally, Plaintiff's lack of evidence stems more from his need for ongoing treatment than from a lack of diligence on Plaintiff's part. As an alternative to dismissal, Plaintiff requests the Court exercise its discretion to defer ruling on a request for summary judgment when facts

essential to the nonmoving party's opposition are unavailable. Dkt. No. 26 at 10 (citing Fed. R. Civ. P. 56(d)). Given the unique circumstances here, the Court finds sufficient cause to defer ruling on Defendant's motion as to future wage-related damages per Rule 56(d) to allow Plaintiff an opportunity for his medical condition to stabilize enough to determine his future work capacity.

3. **Other Economic Damages**

Defendant argues that Plaintiff has presented no evidence to support a claim for any other economic damages. Dkt. No. 24 at 13. Plaintiff does not address this issue in his response. As such, the Court finds it appropriate to GRANT Defendant's request for summary judgment as to any claim for economic damages that Plaintiff has not yet disclosed.

**B. Motion for Continuance and to Amend the Trial Schedule**

Plaintiff notes that Mr. Aldan has not been released from post-operative care related to his hip surgery in April 2022. Dkt. No. 54 at 1. While at least some of the post-surgery related therapies recommended by Dr. Darby have already been completed and will no longer be considered in the calculation of potential future medical expenses (Dkt. No. 26 at 6, n.1), Plaintiff has not fully recovered as expected. Dkt. No. 54 at 2.

When asked at oral argument about Plaintiff's post-operative treatment status, Plaintiff's counsel stated that Mr. Aldan's condition has not completely stabilized, and there is a possibility that additional surgery may be required before Plaintiff is determined to have reached maximum medical improvement. Based on these unique circumstances, and the shifting nature of potentially related damages, Plaintiff has requested that the Court continue the trial and amend the scheduling order to allow more time for Plaintiff's condition to stabilized. Dkt. No. 54, *see also* Dkt. No. 26 at 10 (arguing for a Rule 56(d) deferral on the issue of future damages). In his motion for continuance, Plaintiff estimates an additional six months is needed for his medical

condition to stabilize enough to determine his future medical needs and work capacity. *See* Dkt. No. 54 at 3-4. Defendant opposes any further delay and notes that damages will eventually have to be fixed, suggesting that granting Plaintiff's request will encourage Plaintiff to continue delaying trial to amass potential damages indefinitely. Dkt. No. 56 at 1-8. Defendant further argues that amending the schedule as requested by Plaintiff and extending the discovery period without restriction would unfairly allow Plaintiff to correct previous disclosure errors. *Id.* at 8-10.

While the Court is sensitive to the amount of time that has passed since this litigation began, Defendant has previously agreed to continue this case for similar reasons, which is to say, this is Plaintiff's first *opposed* motion for a continuance. At this point, there is no evidence that Plaintiff has acted in bad faith in terms of his pursuit of treatment. It is not Plaintiff's fault that his medical providers have not released him from care or to return to work.

As such, the Court finds good cause to allow Mr. Aldan sufficient time to complete his current round of anticipated treatment and evaluation.[4] *See* Dkt. No. 54. Consistent with the Court's finding of sufficient cause to defer ruling on Defendant's motion as to future earning capacity per Rule 56(d), the Court GRANTS Plaintiff's request for continuance and will separately enter an amended case management schedule consistent with this order.

This ruling does not give Plaintiff *carte blanche* to correct his previous disclosure deficiencies. The Court will reopen discovery limited to Plaintiff's ongoing post-operative care and determination of future work capacity only. Plaintiff may supplement prior productions, interrogatories, and disclosures as required by the rules, but discovery related to any other issue

[4] That said, the Court accepts Plaintiff-counsel's description of Mr. Aldan's remaining care to mean that this will be the final delay needed to sufficiently clarify Plaintiff's damages claims for trial. Any future request for continuance will be met with extreme skepticism and will require a much more significant showing of good cause to succeed.

for trial, including past medical treatment and costs (other than that discussed in Section III.A.1.a.3) or other economic damages amassed up to the previous deadlines, remains closed.

## IV. CONCLUSION

Consequently, the Court ORDERS as follows:

1. Defendant's Motion for Partial Summary Judgment on Damages (Dkt. No. 24) is GRANTED IN PART and DENIED IN PART.
    a. The Court GRANTS summary judgment as to any previously undisclosed economic damages.
    b. The Court DENIES summary judgment as to Plaintiff's claims for past medical costs, future medical costs and treatment, and past wage loss.
    c. The Court defers ruling on Defendant's request for summary judgment as to Plaintiff's claims for future wage loss and loss of earning capacity per Rule 56(d). The Court will terminate Defendant's motion, but Defendant is GRANTED leave to renew its motion on this issue at the close of the extended discovery period, if appropriate.
2. Plaintiff's Motion to Continue Trial and Amend the Case Schedule (Dkt. No. 54) is GRANTED.
    a. The Court will reset the trial date and enter an amended case schedule in a separate order.

b. The extended discovery period and reset disclosure and motion deadlines are limited to: (i) Dr. Darby's opinions regarding Plaintiff's past medical expenses; and (ii) Plaintiff's ongoing post-operative care and determination of future work capacity only.

Dated this 16th day of December 2022.

Tana Lin
United States District Judge